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Supreme Court of the United States.

OCTOBER TERM, 1940.

No. 336

LEROY A. BERRY,
PETITIONER,
v.
UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

C. L. DAWSON,
Washington, D. C.
P. F. GIBSON,
F. E BARBER, JR.,
Brattleboro, Vt.,
Attorneys for the Petitioner.

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To the Honorable, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, and the appellee below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above cause on May 15, 1940 (R. 387).

OPINIONS BELOW.

The Judge of the District Court of the United States for the District of Vermont did not render an opinion. The opinion of the United States Circuit Court of Appeals for the Second Circuit is set forth in the record at pages 383–386.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Second Circuit was entered on May 15, 1940 (R. 387).

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

This case involves two questions. First, whether the petitioner adduced sufficient evidence at the trial of his cause to sustain the verdict of the jury finding him permanently and totally disabled under his war risk insurance contract as of June 16, 1918 (R. 36). Second, whether the United States Circuit Court of Appeals for the Second Circuit erred in directing the District Court to dismiss the petition of the petitioner instead of ordering a new traial.

STATUTES AND REGULATIONS INVOLVED.

The pertinent statutes and regulations relating to permanent and total disability under the War Risk Insurance Contract of the petitioner will be hereinafter discussed.

STATEMENT OF FACTS.

The petitioner brought suit on his $10,000 war risk insurance contract (R. 3) in the United States District Court for the District of Vermont. He alleged that while in the military service of the United States during the World War, he applied for and was granted $10,000.00 War Risk Insurance, and that while this contract was in force he became permanently and totally disabled, in June, 1918, and entitled to payments in accordance with its terms (R. 4).

At the trial of this cause the petitioner adduced evidence showing that he had suffered the loss of his left leg while engaged on the battlefields of France, and that he had also sustained a severe nervous shock and injury to his right leg;

that he had been unable to use his artificial limb for his left leg, and furthermore that he had had no substantial earning capacity since the date of his injury in France. The jury rendered a verdict in petitioner's favor, finding him permanently and totally disabled as of June 16, 1918 (R. 368).

The respondent appealed upon the ground that the District Court erred in refusing to direct a verdict for the respondent on the ground that the evidence was insufficient to show that the petitioner became permanently and totally disabled on June 16, 1918, as found by the jury.

The United States Circuit Court of Appeals for the Second Circuit reversed the judgment of the District Court for the reason that it was held that the Trial Court should have granted the motion of the respondent for a directed verdict. The first question involved in this case is whether there was enough evidence offered on behalf of the petitioner to justify the submission to the jury of the question of permanent and total disability. The petitioner insists that there was ample evidence upon which a jury of reasonable men could have reasonably found that the petitioner was permanently and totally disabled on the date alleged, and that the issue as to permanent and total disability was one of fact and not of law, and that the verdict of the jury should not have been set aside.

SPECIFICATION OF ERRORS TO BE URGED.

That the United States Circuit Court of Appeals for the Second Circuit erred in holding that the District Court should have directed a verdict for the respondent because of insufficiency of the evidence to sustain the petitioner's cause of action, and that the Circuit Court further erred in dismissing the petitioner's cause of action and not awarding a new trial.

REASONS FOR GRANTING THE WRIT.

The petitioner asserts that a writ of certiorari should be granted under subdivision 5 (b) of Rule 38 of this Court in that the United States Circuit Court of Appeals for the Second

Circuit has rendered a decision in conflict of the decision of the other Circuit Courts of Appeal on the same question, and has decided a question of law in conflict with the decisions of this Honorable Court, and has deprived the petitioner of the right of a trial by jury on an issue of fact in violation of the Seventh Amendment to the Constitution of the United States of America.

ARGUMENT AND BRIEF.

POINT 1.

This is a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, which ordered the reversal of a judgment in favor of the petitioner on a war risk insurance contract in the District Court of the United States for the District of Vermont, and directed the dismissal of the petitioner's cause of action.

The Circuit Court held in its opinion that the petitioner did not adduce sufficient evidence to show that he became permanently and totally disabled on June 16, 1918; the date found by the jury. The Circuit Court therefore concluded that the District Court erred in refusing to direct a verdict for the respondent.

Permanent and total disability has been defined under the contract of war risk insurance as follows:

> "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in Article III and IV, to be total disability.
>
> " 'Total disability' shall be deemed to be 'permanent' whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. Whenever it shall be established that any person to whom any installment of insurance has been paid as provided in Article IV on the ground that the insured has become totally and permanently disabled has recovered the ability to continuously follow any substantially gainful occupation the payment

of installments of insurance shall be discontinued forthwith and no further installments thereof shall be paid so long as such recovered ability shall continue."

(Reg. 11—March 9, 1918.)

This regulation defining permanent and total disability has been interpreted by this Court in the case of *Lumbra* v. *United States*, 290 U. S. 511, 78 L. Ed. 492. This Court held that in order to meet the requirements of permanent and total disability one must not be hopelessly bedridden, nor would the mere fact that the disabled veteran had engaged in an occupation or occupations at various periods prevented a recovery on the war risk contract.

In other words where the degree of disability is major and the veteran has been unable to work continuously without injury to his health and danger to his life, the mere fact that he has performed some labor, will not prevent recovery on his war risk insurance contract.

In order to ascertain the correctness of the ruling of the Circuit Court it becomes necessary to examine the evidence offered on behalf of the petitioner. The rule is well settled that if there is any evidence from which reasonable men could reasonably find for the petitioner the issue of fact is for the jury. It is only when the evidence is wholly insufficient that the Court is justified in directing a verdict for the respondent. *Gunning* v. *Cooley*, 281 U. S. 90–94. Therefore with this rule in mind let us examine the evidence offered to the trial of this cause.

The petitioner enlisted in the military service July 1, 1917 (R. 283). His pre-war occupation was that of a farmer. He went over seas in September, 1917 (R. 12). In February, 1918, he went into the front lines at Chemin Des Dames, and during this period of time had the mumps (R. 13). In April, 1918, he was transferred to the Tour sector and was under heavy shell fire. The last of May and 1st of June, 1918, he suffered from influenza and was hospitalized, and was released from the hospital June 8, 1918 (R. 294–5). Eight days after being discharged from the hospital following his influenza attack he

was placed in front line trenches on an all-night guard watching for raids and enemy patrols. It was then when the incident happened which petitioner claims resulted in his permanent and total disability. Following is his description:

> "I was standing guard and the enemies started shelling the front line, and the first shell * * * * came over near where I was * * * landed very close to our squad and that was where I got my first wounds. * * * One piece [of shrapnel] went in my right arm just above the elbow and another piece in the right shoulder, and one piece in my right hip, and a couple small pieces in front of my right ear * * * there is still a piece in my elbow and still a piece in front of my ear. The other two pieces have worked out. * * * The first thing I knew after I was hit there was a fellow helped me down the tranch toward a dugout; another fellow was helping me down the trench and we met Platoon Lieutenant * * * I was ordered to go down into this dugout. The other man was ordered to take me down there until the barrage lifted, or they stopped shelling the front lines, so I could get back to the First Aid Station. * * * [There] I found several other fellows in a similar condition. They had all been hit and were waiting for an opportunity to get back to the First Aid Station. * * * There was, well, eight or nine or ten, I don't remember exactly how many, and a couple of fellows in there—one was our Platoon Sergeant. [He] was trying to undo a first aid pack to put on another fellow's leg and there was another fellow that was wounded—not very severely—that tried to undo one to put on my hip. The barrage started about 3.30 in the morning and it was probably within fifteen minutes that I went into this dugout * * * I had been in the dugout about fifteen minutes to half an hour when another shell came over and struck directly in front of the dugout door. The dugout, by the way, was only a small thing; it wasn't any depth or size to it—just a sort of shelter in the side of the trench. This shell struck probably fifteen feet in front of our door * * * and it upset the whole nine of us or ten of us whatever it was that was in there, and I know the Sergeant that was right beside my feet, trying to undo the first aid pack. It killed him outright and he landed over on top of me—pitched over right on top of me—when I got him off my body I

found my leg here was hit; I found the bottom of the foot was turned up so I could see the bottom of the shoe; it was practically cut off. * * * It was the left leg below the knee and the blood was streaming out. There was no one—didn't seem to be—there to help me to cord it up or anything of that sort and I managed to take what was left of my wrap legging that we all wore and tied it around there and twisted it up enough so it shut the blood down some. Within a few minutes there was another fellow came along and looked in there— He put a stick through the tourniquet I had on there and twisted it up and fastened it so it would stay. [In the dugout] there was two others that died within a very few minutes that were right there very near to me, and there was two beside myself that I know of got out of it alive that are still living * * * [After this shell hit] there was no one able to move to get out of there or anything of that sort. It was approximately 10.30 in the forenoon before I was put on a stretcher and carried out. * * * I was taken back to the First Aid Station where they put on what was called a Thomas splint to hold that foot out straight and stretch it out so the bones wouldn't grate together, and a different tourniquet put on and something for a dressing was put on and they gave me, I think, at that place, two shots in the arm. * * * It was about five or five-thirty in the afternoon when I got back to the hospital where there were doctors. I was carried into the receiving ward along with others and laid on the floor in a line * * * and the operating surgeon came out * * * and looked along at the different fellows there in the receiving ward; he started to pass me and looking along at the different ones turned around and came back to look at me and spoke to me and asked me where I was hit. I told him my leg and he lifted up the blanket and looked at it, felt of my pulse, and turned around to the attendant and told him to get my clothes off and get me into the operating room as quick as they could." (R. 14–15–16 and 17.)

The left leg was amputated about five and one-half inches below the knee. In addition thereto the petitioner sustained an injury on his right leg on the inside near the crotch. As a result of this injury he has a scar 7¾ inches long on the back

of the leg where part of the shrapnel came out and the rest was removed after the left leg was amputated. He also sustained a further injury on the right leg, leaving a scar of about 3 inches below the hip bone in the rear of the right leg. He also sustained an injury of the right arm just above the elbow on the right side. There was another injury just in back of the right shoulder just below the shoulder joint. There was also an injury on the right chest just under the collarbone on the right side, and an injury just in front of the right ear, all as a result of the shell explosion. At the time of his discharge, the petitioner complained to the discharging Doctors of the trouble in his right hip and of being nervous and not able to sleep and being sick to his stomach from noises and different things. The petitioner was advised that his nervousness would wear off and at the time of his discharge from the service the amputated leg had healed except for a little spot, which discharged periodically (R. 130). He had a temporary wooden leg which he could not use because it did not fit. He used crutches and a cane to get along without the temporary leg (R. 20). In May, 1919, the petitioner was furnished another leg which caused blisters and abscesses and the stump would become very sore if used for any length of time (R. 20). He was married on April 19, 1919, and went to Boston on his wedding trip (R. 187). At the time of his marriage he couldn't use his artificial leg for two days at a time (R. 25). This condition has existed since his military service and certainly since his marriage (R. 191). In the summer of 1919 the petitioner was sent to a photography school in New York. This was vocational training given him by the Government. The stump of his leg bothered him all this summer, getting blistered and sore, and he started having trouble on the outer side of the leg (R. 25). He used crutches a great deal, which made it difficult to get on and off cars, and resulted in falls (R. 25, 26). In the summer of 1919 thunder showers made him ill if he was awake. They nauseated him and made him sweat. When the showers came at night the petitioner would live the war over again. "See the whole thing all over again." "See the shells flying

and breaking." (R. 27.) The evidence further shows that since his discharge the petitioner has been to two Fourth of July celebrations where there were fireworks. On both of these occasions he became sick and shook all over. If the petitioner goes to the movies and sees soldiers, airplanes or shooting, it makes him sick and nervous and he leaves because he can't stand it (R. 27). Thunder storms have had a bad effect on him; they upset his stomach and this has been true since his discharge (R. 189).

In the year of 1919, a nerve abscess came on the stump. The petitioner was treated by the Veterans Bureau in New York and by Dr. Bookstaver in whose apartment they were living. The petitioner was in New York four months that time and then went to Effingham, Illinois, where he was on crutches some of the time. He returned to New York in November, 1919, and found he was not able to do retouching of photographs because he was so nervous and his hand shook (R. 30).

At the request of the Government the petitioner did go to Boston to try retouching photographs at Marceau's studio, and found he couldn't do it (R. 133, 134), after working one and one-half hours. During the remainder of the year of 1919 and the winter of 1920, the petitioner did no work. In the spring of 1920, he moved to St. Johnsbury, Vermont, and went to work for the Fairbanks Scale Shop in the p int department, where he worked eight days, and lost his job because he was losing so much time. Then he went to work at the Carey Box Shop which was near where he was living. He lost a lot of time because of nerve abscesses on his stump, and at this time Dr. Tierney of St. Johnsbury treated his leg for nerve abscess and blister, and recommended that the petitioner go to the Parker Hill Hospital for an operation (R. 30). The petitioner did go to the Parker Hill Hospital in the spring of 1920 and was there for two weeks; he was operated on and two growths were taken out. He returned home during the Middle of May, 1920 and was not able to work any more that summer or fall. The stump didn't heal up until late July, and, thereafter, the stump was so tender the artificial leg was unbearable (R. 31).

It can thus be seen that for the first two years following his discharge from the service the petitioner did not work at any gainful occupation because of his wounds and nervous condition. In January, 1921, the Government started the petitioner in vocational training as an auto mechanic (R. 32). He was with the Lyndonville Auto Sales Company until May of 1921, and then tried the Morrow Garage in Danville, where he was for about three months. Thence he went to the Corner Garage in St. Johnsbury and trained there until November, 1922 (R. 32). While at the Morrow Garage he was treated by Dr. Libby (R. 127). While training at the Corner Garage he would take his artificial leg off and put it on the bench while he worked, and used crutches. There he used to be given work taking up bearings where he could lie on his back (R. 102). The foreman had trouble keeping him because the owner wanted the petitioner to be discharged because he had lost so much time (R. 102).

The respondent's Exhibit H (R. 344) shows that the petitioner lost considerable time on account of sickness while in vocational training. The Veterans Bureau officials wrote him letters, inquiring why he had lost so much time, and the vocational officer complained to him about his lost time (R. 34). The petitioner left the Corner Garage in November, 1922, and went to Woodbury and Benoit's Garage in St. Johnsbury, where he completed his training in April, 1923. After he completed his training he worked nearly six months, but missed at least two days a week. He was troubled with his stomach, stump and right hip during this time. He was discharged because he didn't attend to his work steady enough (R. 35 and R. 216).

After he was discharged from Woodbury and Benoit's Garage in the fall of 1923, he tried working again at the Fairbanks Scale Shop doing work on electric motors and machines. He worked there about two weeks and was discharged because he lost so much time due to his leg (R. 36). He did no other work until March, 1924, until he was able to do repair work at his home (R. 37). From the spring of 1924, until the year of 1928, he lived on a farm near Sheffield. While on this farm he was

treated by Dr. Herrick of West Burke, and Dr. Jones of Sheffield (R. 127). During this four year period the petitioner did very little farming on the farm because of his leg; the farm was run by his hired man and his wife. His wife's two sisters lived with them about half of the time and they helped with the chores and the garden. The petitioner couldn't garden because of his leg; he couldn't get around the garden on crutches. In 1925, he went into a little garage business in Sheffield for a few months with a man named Orcutt, but Orcutt didn't stay in the partnership because he had to do most of the work (R. 38).

Orcutt testified that the petitioner couldn't stand on his feet any length of time, that he would work lying on the fender with his leg hanging off or he would take off his wooden leg and do work on generators where he could sit at a bench, or he worked on crutches. They did no garage work during the winter of 1925 and 1926, and in the spring of 1926, the partnership was taken over by one named Davidson (R. 60).

In 1928 the petitioner lost the farm, so the family moved to Lyndonville. He worked during the summer for Nadeau (R. 39). He was discharged early in the fall because he lost so much time (R. 39 and R. 107). In the late fall of 1928, the petitioner went into partnership with one John Bishop of Lyndonville. Bishop complained about having to do most of the work and in the summer of 1929, quit the partnership. The venture ended in December, 1929 (R. 39). In the year 1930 the petitioner tried selling aluminum kitchen utensils, but found he couldn't cover the territory assigned to him, although the wife did most of the work (R. 40). He gave this aluminum sales contract up after a short time. Thereafter he tried to sell a spot remover, and later in 1930–1931 he tried selling the Airway Vacuum Cleaners and was unable to cover his territory. His leg would become sore from carrying sample cases and then would have to stay home for several days (R. 41). In the spring of 1931 he tried selling wrenches and special tools, but had the same trouble with that work (R. 40).

The petitioner lived in Hardwick, Vermont, for seven years until 1937. During all this time he has had no job of any

steady nature and has been unable to hold any such job, but has tried odd jobs (R. 41). He tried a little trucking, and bought a truck, but lost the truck because he couldn't carry on (R. 42). With the help of high school boys he operated a small filling station and sold about 100 gallons of gasoline a day for about six months (R. 42).

In December, 1937, he moved to Brattleboro, Vermont. There he attempted working at two different filling stations; one job he quit because he couldn't stand the strain on his leg; it became blistered and sore (R. 42). The other job he worked only on Saturdays and Sundays, and even on those occasions after working two days would have to be on crutches the rest of the week (R. 43).

The foregoing is a short summary of the petitioner's testimony which is corroborated in every particular by his eighteen witnesses. Dr. Tierney of St. Johnsbury testified (R. 73), he treated the petitioner on July 16, 1920, and had treated him previous to that time. In 1921 he made up his mind that the petitioner's condition would never improve. He stated that the petitioner's condition would not improve because there had been poor surgery and there was not enough muscular flap or pad left at the time of the amputation to properly protect the stump. The nerves of the leg were not covered; they were too close to the surface (R. 72). This doctor stated that the petitioner had sustained a severe shock to his general nervous system, and in support stated that he did not see how the petitioner could be in any condition to pursue a gainful occupation since the wound was received (R. 74).

A capitulation of the petitioner's activities since the date of his injury and discharge from the service in 1919, shows the following summary:

Years of 1919, 1920, short period of time in vocational training, otherwise no employment.

From January, 1921, to April, 1923, in vocational training, losing considerable time on account of sickness, and unable to work.

April, 1923, to approximately October 1, 1923, Woodbury & Benoit Garage, St. Johnsbury, Vermont, employed, missing two days a week and discharged because he was unable to work.

October, 1923, Fairbanks Scale Shop, two weeks; discharged because he lost so much time.

November, 1923, until March, 1924, no employment during this time.

March, 1924, until spring of 1928, lived on a farm near Sheffield, Vermont, doing very little work on farm, the farm being operated by hired man, his wife and other relatives.

In 1924 and 1925, tried to carry on partnership with one Orcutt, but was unable to do the work.

In the year of 1928 he went into partnership with one John Bishop in Lyndonville, in a garage, and after a few months Bishop quit the partnership because he had to do all the work.

In 1930 he tried selling aluminum cooking utensils, but found he could not cover the territory assigned to him although his wife did most of the work; also tried to sell spot remover.

During the summer of 1930, and in the winter of 1930 and 1931, he tried to sell Airways Vacuum Cleaners, but was unable to cover the territory.

In the spring of 1931 he tried selling wrenches and tools, but had the same trouble with this work (R. 40).

Since 1931, he has had no work of any steady nature. He tried trucking, but was unable to do the work and lost his truck; operated some filling stations, sold about 100 gallons of gasoline a day for about six months. Had 3 or 4 high school boys working for him during that time.

This is substantially all of the work record of the petitioner since his discharge.

The record in this case shows overwhelming evidence that the petitioner has suffered from abscesses on his stump and

neuroma from the date of his injury to the present time. The evidence further shows that the petitioner's right leg was weakened on account of his wound, and tired easily, and petitioner has been unable to stand on it for any length of time. It is respectfully submitted that if the evidence adduced on behalf of the petitioner is to be believed by the jury, that there was sufficient evidence to show that this petitioner was permanently and totally disabled from the date of his injury on the battlefields of France.

The petitioner does not dispute the rule that a mere loss of a leg is not of itself a permanent and total disability, but in this case the evidence goes far beyond showing the mere loss of a leg. Not only does the evidence show that the petitioner has lost his left leg, it shows that the petitioner suffered grievous injuries to his right leg, so he could not use such leg for any sustained effort. The shrapnel which passed through the right leg and which had been taken out after the battle injury, unquestionably weakened the muscle of that leg, which is evidenced by the several scars on the right leg, one of which is 7¾ inches long. The loss of the left leg and the injuries to the right leg, plus the nervous shock which the petitioner still suffers takes this case out of the rule laid down by the courts that the mere loss of one leg is not a permanent and total disability. It is the combination of disabilities, to wit: the nervous condition, the weakness of the right leg and the loss of the left leg, which constitutes the permanent and total disability. Certainly no man has ever made a more heroic effort to earn a livelihood than this petitioner and for that reason the respondent wants to penalize him.

In determining whether there was any evidence to sustain a verdict for the petitioner all facts that the evidence supporting his claim reasonably tends to prove should be assumed as established and all inferences fairly deducible from them should be drawn in his favor. *Lumbra* v. *U. S.*, *supra.*

Where two different conclusions may reasonably be drawn from uncontroverted evidence the question as to which should be drawn is for the trial court and not for the appellate tribunal.

Gunning v. *Cooley*, 281 U. S. 90, 94;
United States v. *Gamble-Shagnó, Inc.*, 91 Fed. (2d) 372, 374, 8th CCA.;
Hearst Radio Inc. v. *Good*, 67 App. D. C. 250, 251, 91 Fed. (2d) 555, 556;
United States v. *Stewart*, 61 App. D. C. 115, 58 Fed. (2d) 520;
United States v. *Ingalls*, decided by the United States Court of Appeals D. C. on August 5, 1940.

It is believed that the decision of the U. S. Circuit Court of Appeals for the Eighth Circuit in the case of the *United States* v. *Dupire*, 101 Fed. (2d) 945, conflicts with the decision of the Second Circuit in the instant case. In the *Dupire* case the Eighth Circuit laid down the rule that the mere loss of a leg in the absence of other complications would not constitute total and permanent disability, but whether the loss of a leg constitutes total disability within a War Risk policy depends upon the facts in each particular case. That evidence showing amputation of the insured's leg, though successful from a surgical standpoint, which left symptoms of deterioration of bone matter and so stump of leg was in constant state of irritation, and in addition the insured developed a highly nervous condition, sustained a finding that the insured was permanently and totally disabled under a War Risk insurance contract.

Compare also the opinion of the U. S. Circuit Court of Appeals for the Eighth Circuit in the case of *U. S.* v. *Rice*, 72 F. (2d) 676. The opinion of the Court in the *Rice* case cannot be reconciled with the opinion of the Second Circuit in the instant case.

The decision of the Second Circuit in the instant case also conflicts with the views of the U. S. Circuit Court of Appeals for the Fifth Circuit in the case of *Thomas* v. *U. S.*, 92 F. (2d) 929, which was a War Risk Insurance case involving an injury to the petitioner's left leg in which the Fifth Circuit Court of Appeals held that the evidence was sufficient to take the case to the jury.

The decision of the Second Circuit Court of Appeals also conflicts with the views of the U. S. Circuit Court of Appeals for the Ninth Circuit as expressed in the case of *U. S.* v. *Scarborough*, 57 F. (2d) 137, where the Ninth Circuit held that gunshot or shrapnel wounds in the left leg of an insured were sufficient to constitute a permanent and total disability under the War Risk Insurance contract.

The U. S. Circuit Court of Appeals for the Ninth Circuit affirmed its views expressed in the *Scarborough* case in the later case of *U. S.* v. *Suomy*, 70 F. (2d) 542. The only difference between the *Suomy* case and the instant case is that in the *Suomy* case the plaintiff lost a portion of his left arm instead of his leg, as in the instant case. Also compare the views of the U. S. Circuit Court of Appeals for the Ninth Circuit in the case of *U. S.* v. *Rasar*, 45 F. (2d) 545.

It is true that the respondent may cite a number of cases involving only the loss of a leg, but these cases, the petitioner earnestly contends, are not in point. Here, the petitioner since the date of his discharge from military service has attempted time and again to make an honest and earnest effort to earn a livelihood. He has not succeeded because of his disabilities.

Your petitioner strongly urges these following few, simple thoughts to his Court of last resort:

The Circuit Court of three judges sitting over three hundred miles from the scene of trial overruled the verdict of a jury of twelve men and set itself up as a jury of the facts superior to the jury which actually heard the evidence and saw the witnesses.

There is a great tendency for all Appellate Courts to-day to set themselves up as a better judge of the facts than the twelve men who actually hear the evidence and see the witnesses. That tendency must be curbed.

The Circuit Court in its opinion says that the petitioner could not carry on his work as a photographer for which he had vocational training; it says he could not carry on his work of automobile mechanic for which he had vocational training. But because some twelve years after receiving his disability, for a period

of a few months he sold aluminum products on the road, the Circuit Court says that as a matter of law he could carry on some gainful occupation.

The petitioner wishes to forcefully point out that whether he could or not was a question of fact for the jury and the evidence was extremely one sided in the petitioner's favor in this regard. The evidence of his selling experience further clearly indicates that to do this selling he had to have his wife with him to do the hard work, the cooking of the meals, the washing of dishes and the carrying of the equipment around. All the petitioner did was to make a sales talk; that his expenses in providing food and in traveling around and taking his wife with him ate up more than he could earn and that is why after a few months he gave up his attempts at selling, and that is the only point that the Circuit Court cites as to how he might have been gainfully employed.

That question was surely before the jury on all the evidence in the case, and the petitioner asks this Supreme Court to review this case, and to protect him from having a decision of twelve men on facts overruled by three judges far removed from the scene of trial.

The rule laid down by the Second Circuit goes far beyond the rule laid down by this Honorable Court in the case of Lumbra v. U. S., supra. It violates both the letter and the spirit of the Seventh Amendment to the Constitution of the United States, guaranteeing the right of trial by jury, and this Court should grant this petition for a writ of certiorari.

Point 2.

The second point raised by the petitioner goes to the right of the Circuit Court to reverse the judgment and order that the petition of the petitioner be dismissed (R. 387).

The respondent made a motion for a directed verdict at the close of all of the testimony (R. 250). This motion was passed upon immediately by the District Court (R. 251). The Court did not take the motion under consideration and reserve its decision as might be done under subdivision (b) of Rule 50 of the Rules of Civil procedure which provides as follows:

"Rule 50 * * *

"(b) RESERVATION OF DECISION ON MOTION.

"Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, party who has moved for a directed verdict may move to have the verdict set aside and to have judgment entered in accordance with his motion for a directed verdict or if a verdict was not returned such party within 10 days after the jury has been discharged may move for judgment in accordance with his motion for a directed verdict. A motion for new trial may be joined with this motion or a new trial may be prayed for in the alternative. If the verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict has been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

The respondent in this cause did not move to set aside the verdict within ten days as required by the rule, and in fact the record shows that it failed to make any motion under Rule 50 except the motion for a directed verdict which was denied before the issue of fact was decided by the jury in the petitioner's favor.

The Circuit Court therefore had no authority to order that the petitioner's cause of action be dismissed as the case falls squarely within the rule laid by this Court in the case of *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, 57 L. Ed. 879, holding that a new trial must be awarded.

The respondent did not follow the rule which permitted the Circuit Court to dismiss the petition on a question of law, it did no more than was done by the respondent in the *Slocum* case.

Nor is the case of *Baltimore & C Line Inc.* v. *Redman*, 295 U. S. 654, 79 L. Ed. 1636, authority for the dismissal of

this action by the Circuit Court for the reason that in the *Redman* case the District Court reserved its decision on the motion for a directed verdict. Subdivision (b) of Rule 50 provides that the party making the motion for a directed verdict must take further affirmative action, and until that action is taken the matter stands as if no motion had been made.

The Circuit Court should have ordered a new trial under the ruling of this Court in the *Slocum* case.

In this manner substantial justice will be done. In its opinion the Circuit Court said (R. 385):

> "To succeed upon that issue (permanent and total disability) he must show that he was unfitted for his former calling, or that for which he chose to be trained but for any other that was open to him." * * *
>
> "There was no convincing evidence to justify that conclusion although a jury might have found that he was unable to do the work of a garage mechanic or that of a 'retoucher of photographs.'"

Upon a new trial the petitioner may well supply the defects, if any, in the testimony sufficient to prove a permanent and total disability.

He should be given that right, and he is entitled to a new trial unless this Court has overruled its previous decision in the *Slocum* case, *supra*. In the *Redman* case, this Court distinguished the *Slocum* case and did not contend that the previous decision in the *Slocum* case was overruled.

For this reason alone the petition for a writ of certiorari should be allowed.

CONCLUSION.

Wherefore, Petitioner prays that a writ of certiorari may issue under the seal of this Honorable Court in this Cause directed to the United States Circuit Court of Appeals for the Second

Circuit and upon such a review the judgment of the Circuit Court of Appeals for the Second Circuit be vacated, reversed and set aside, and that this case be remanded to that Court with instructions to proceed further in accordance with the views of this Court.

C. L. DAWSON,
Washington, D. C.
P. F. GIBSON,
F. E. BARBER, JR.,
Brattleboro, Vt.,
Attorneys for the Petitioner.

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